STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Bandstra, P.J., and Cavanagh and Zahra, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

WILLIAM COLE GRANT,

Defendant-Appellant.
_____/

Supreme Court No. 119500

Court of Appeals No. 214941

Lower Court No. 97-010185-FC

LIVINGSTON COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S BRIEF ON APPEAL

*****ORAL ARGUMENT REQUESTED*****

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Livingston County Circuit Court by jury trial, and a Judgment of Sentence was entered on August 11, 1998. A Claim of Appeal was filed on October 7, 1998 by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated January 15, 2002, as authorized by MCR 6.425(F)(3). The Court of Appeals had jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1), MCL 770.3, MCR 7.203(A), MCR 7.204(A)(2). This Court now has jurisdiction pursuant to MCR 7.301(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. IS DEFENDANT ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE CONSISTING OF EYEWITNESS TESTIMONY CONCERNING A BICYCLE ACCIDENT?

Court of Appeals answered, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee would answer, "No".

II. WAS DEFENDANT DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE COUNSEL FAILED TO INTERVIEW AND PRODUCE AT TRIAL EYEWITNESSES TO THE BICYCLE ACCIDENT?

Court of Appeals answered, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee would answer, "No".

STATEMENT OF FACTS

Defendant-Appellant WILLIAM COLE GRANT was charged with and convicted of one count of first-degree criminal sexual conduct (under 13 years of age), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (under 13 years of age), MCL 750.520c(1)(a), after a jury trial in the Livingston County Circuit Court, the Honorable Daniel Burress presiding. On August 10, 1998, Mr. Grant was sentenced to 10-40 years imprisonment for first-degree CSC and 10-15 years imprisonment for each count of second-degree CSC.

Trial

The instant charges involved allegations by the prosecution that Mr. Grant engaged in sexual penetration of Lucy Guido, age 8, on October 22, 1995 and that he also engaged in sexual contact with Lucy and her younger sister, June, by putting his hand in their pants in November 1996. Defendant Grant was the boyfriend of the girls' aunt, Amanda Cain. Defendant Grant maintained that he did not commit the instant offenses, that the vaginal injury sustained by Lucy Guido on October 22, 1995 was the result of a bike accident, and/or that Lucy Guido had a habit of making things up. The prosecution maintained from the beginning of trial that although Lucy Guido initially reported that the injury was incurred during a bike accident because she was so instructed by Defendant, the injury was really caused by sexual penetration (19a-20a).

During the course of the two day trial, the following witnesses testified on behalf of the State: Dr. William Bradfield, Dr. Jamie Bond, Lucy Guido, June Guido, Leah Heater, Patricia Heater, Anthony Guido, and Officer Jacqueline Bedard. The defense called three witnesses: Sam Cain, Sr., Sam Cain, Jr., and Amanda Cain.

Dr. William Bradfield was the obstetrician-gynecologist, who saw and treated Lucy Guido on October 22, 1995 at the McPherson Hospital emergency room regarding an injury to her genitals (21a). At that time, Lucy Guido told Dr. Bradfield that she had been injured in a bicycle accident (25a). The injury required surgical repair to the posterior portion of her vagina (26a-27a, 35a-36a). As a result of his examination of Lucy Guido, Dr. Bradfield reached the conclusion that the injury was the result of a bicycle accident; however, he indicated that if the history had been different, his conclusion could have been different (23a. 32a). Dr. Bradfield testified that the observation in his report that there was no evidence of sexual abuse was mostly based on the history he obtained from Lucy Guido (40a). He also went on to testify that the two injuries (bike accident v. sexual abuse) can be "very similar" and that "physically you can't – you can't tell the difference" between a bike injury and sexual abuse (23a, 32a, 40a). He testified that because the two injuries are "very similar," the history as reported by the victim is "so important" in making the diagnosis (32a).

Dr. Jamie Bond, an obstetrician-gynecologist, testified that she examined Lucy Guido on December 12, 1996, after she was brought into her office by her father and her "big sister" Theresa (41a). Dr. Bond interviewed Lucy, who indicated that a person had put his penis inside her, that he had threatened her, that he told her to say it was a bike accident, and that this was why she told Dr. Bradfield it was a bike accident (43a-44a). Dr. Bond conceded that her physical examination of Lucy didn't reveal anything that was remarkable because it had been a couple months since the last alleged incident of penetration (45a, 48a). Dr. Bond also interviewed June Guido who stated that the person had put his hands in her pants or underwear (48a). Afterwards, Dr. Bond telephoned Officer Duquette, who was investigating the instant case, and explained the

nature of the examinations and the information she received from the girls. Dr. Bond also dictated a letter to Officer Duquette (49a).

Lucy Guido, who was eight and nine years old at the time of the alleged incidents, testified that Defendant was her Aunt Amanda's boyfriend (50a-55a). Lucy testified that she was at her grandparents' house in Oak Grove when Defendant told her to walk with him to the woods or "state land." While in the woods, Defendant allegedly pulled down her pants and removed his pants. According to Lucy, they laid on the ground and Defendant penetrated her vagina with his penis (53a-65a). Afterwards, Lucy noticed that she was bleeding and that there was blood on the ground. After walking back to the house, Lucy went into the bathroom, where she observed blood on her private and on her pants. According to Lucy, Defendant told her to say it was a bike accident. She was taken to the hospital by her Aunt Amanda (65a-67a, 86a-87a). She testified that she told Dr. Bradfield it was a bike accident like Defendant had instructed, but that was not the truth (86a-87a). When Lucy went to see Dr. Bond later, she said "it was a bike accident, but I said it wasn't really a bike accident." (90a).

Lucy Guido also described another incident where she and her sister June were swimming with her Aunt Amanda and Defendant Grant; she claimed that Defendant touched her vagina inside her bathing suit (68a). She testified that Defendant did the same thing to June while they were swimming (69a).

Another incident allegedly occurred during a Thanksgiving holiday when Defendant came over to their apartment with Sam Cain Jr. while her father was home. Lucy testified that both she and June called Defendant back to their bedroom. Lucy testified that while she and June were in the bedroom closet, Defendant put his hand in her pants and touched her vagina; he also

did this to June (73a-81a). Finally, Lucy testified that there was an occasion when Defendant put a screwdriver in her vagina (69a-70a).

According to Lucy Guido, Defendant told her not to tell anyone about these events and she was fearful that he would hurt her if she did. She claimed that when she tried to tell her Aunt Amanda, her aunt called her a liar and told her to keep the incidents secret (83a-86a). After telling one of her friends, Leah Heater, the police were contacted by Leah's mother, Patricia Heater (71a-72a, 103a-106a, 108a-109a).

June Guido, age eight, testified that Defendant touched her "bad spot" when she was in the pool and in her bedroom closet. She confirmed that the incident in the bedroom closet occurred while her father and Uncle Sam were present in the apartment. She also confirmed that Defendant reached inside her clothing and that he also did this to Lucy (91a-102a).

Anthony Guido, the father of Lucy and June, testified about his family and living arrangements. He confirmed that in October 1995 Lucy was taken to the hospital for an injury to her vagina, which she said was the result of a bike accident. He also confirmed that in November 1996, Defendant and Sam Cain came to the apartment, and that Defendant went into the bathroom while he was there (110a-119a).

Defense witness, Sam Cain, Sr. testified that his daughter, Amanda, and her boyfriend, Defendant Grant lived with him. His grandchildren, Lucy and June Guido, visited him on the weekends. He confirmed that there was a broken bike that the children rode as a unicycle. He had seen the children pushing the bike, but he did not actually see Lucy try to use it. He was not home at the time Lucy was injured (120a-123a). On cross-examination, the prosecutor asked whether he saw how Lucy was hurt with his own eyes (125a). He replied as follows:

> "No, I just – just what T.J. had told me. That was Lucy's brother. Just what – just what he told me is all I – that's all I knew what – what happened." (125a).

He then confirmed that he had no personal knowledge that he could convey to the jurors (125a).

On direct examination of Sam Cain, Jr., defense counsel asked whether T.J. told Sam Jr. what happened to Lucy, to which Sam Jr. replied, "Yeah." (126a-127a). Immediately thereafter, on cross-examination, Sam Jr. testified that he did not "know how Lucy got hurt until after T.J. come up and told me." (127a).

The only other witness called by the defense was Amanda Cain. She confirmed that she and Defendant lived with her parents in 1995 and 1996 (129a-130a). Ms. Cain testified that she was not present when Lucy was injured, but she went with Lucy to the hospital (131a). Ms. Cain confirmed that there were bicycles at her parents' home and that there was one bicycle that was broken in half that Lucy played with (132a). Defense counsel never called or requested that he be allowed to call T.J. as a witness.

Each party gave their respective closing arguments. During closing argument, the prosecutor argued as follows:

> "Yes she told Dr. Bradfield that it was a bike accident, and Dr. Bradfield said well it could have been a bike accident, it could have been sexual abuse. I had to rely on what she told. Lucy knows she couldn't tell. She followed the instructions of the adult and didn't tell until later, and by the time she went back and saw Dr. Bond, the secret was already out, released by her friend Leah Heater. So the secret was already out and she could tell Dr. Bond that accident, it really wasn't an accident. It was sexual abuse, and that's what Lucy told. She told the truth. Once the secret was out and she told everybody what was happening, what was wrong." (135a-136a).

> "You have the testimony of the medical doctor who told you that that injury, although she said it was a bike and later said no it was no accident, she only said that because the defendant told her to say it, but you know that that injury was equally as consistent with a

> straddle injury or sexual abuse, and in this case, ladies and gentlemen, it was sexual abuse." (141a).

The jury convicted Mr. Grant as charged (161a).

Evidentiary Hearing on Motion for New Trial

After the jury verdict, Defendant Grant retained substitute counsel and filed a motion for new trial based on newly discovered evidence. On July 15, 1998, the circuit court commenced a hearing on Defendant's motion for new trial. June Merrow testified that although she did not see the bike accident, she was present when Lucy was brought to the house and she saw the tear in her jeans in the groin area (162a-163a, 170a). Ms. Merrow testified that she was informed by her sons that they saw the bike accident, and she relayed this information to Defendant's mother on the first day of trial or the day he was convicted (163a-164a, 167a, 174a-175a).

June Merrow's son, Christopher Merrow, testified that he was at his grandmother's house on the day in question and he saw Lucy get injured (176a-177a). Christopher described the incident as follows:

> "They took a bike out in the back of the hill and they took the handlebars and run down the hill with it. There's a pile of metal at the bottom. She hit that and got hurt on the bike handles." (178a).

Christopher went on the state that Lucy got hurt "in her private part," and confirmed that he actually saw the "fall and everything" as he was right "down there" as the accident and injury occurred (178a, 182a). He also indicated that Lucy was "bleeding pretty bad." (179a). Christopher then stated that the only person he talked to about what he saw was his mom, June Merrow. Christopher also testified that although Mr. Grant was at his grandmother's house on

the day in question, he was only there to drop the bike off, and he left right after doing so (178a, 180a).

Daniel Merrow testified that William Grant brought him the bike, watched him ride it for a little bit, and then left. In terms of the injury to Lucy Guido, Daniel testified that "Lucy was running down the hill and when she let go of it, and she just fell on some metal." (183a). Following the fall, he saw that Lucy was bleeding in the area of "the private part in front" and that her pants were torn (186a).

Kathy Wolstone, Defendant's mother, testified that the first time she spoke to any of the other family members, short of saying hello or good-bye, was while they were still in the courtroom after the trial had concluded (187a).

The hearing continued on August 10, 1998. Following arguments, the circuit court denied the motion for new trial, finding that the evidence was cumulative and that it could have been discovered with reasonable diligence (188a-190a).

Sentencing

On August 10, 1998, Defendant Grant was sentenced to concurrent terms of 10-40, 10-15, and 10-15 years imprisonment on his convictions (191a).

Defendant Grant appealed as of right, arguing that he was entitled to a new trial on the basis of newly discovered evidence and ineffective assistance of counsel. In an unpublished opinion dated May 16, 2000, the Court of Appeals remanded for an evidentiary hearing to determine whether trial counsel was ineffective (349a).

Ginther Hearings

The hearings on remand were held on June 7, 2000, December 20, 2000, and January 17, 2001. Attorney David Goldstein testified that he had more than one conversation with Defendant Grant prior to trial (194a). Prior to trial, Goldstein had the names of certain exculpatory witnesses, including Sam Cain, Sr., Sam Cain, Jr., and Amanda Cain (197a-198a). Goldstein could not recall the names of any other witnesses who he was aware of prior to the trial without looking through his file (202a). Based on a review of his file, Goldstein believed that he was aware of the following witnesses: Lucy Guido, June Guido, Tony Guido, Leah Heater, Hal Blom, June Merrow, Kim Dangler, Theresa Barker, and Christine Kee. Goldstein had no recollection of being provided with the names of any other witnesses (202a-206a, 214a). The names of the witnesses who were provided to Goldstein prior to the trial came from either Defendant Grant, his mother, Kathleen Wolstone, or the police report. The name of June Merrow came from either Defendant or Ms. Wolstone (199a-201a, 208a-209a).

Goldstein had two investigators, David Halman (an ex-deputy sheriff) and Heidi Miller (a paralegal), to interview certain witnesses. Heidi Miller prepared a November 11, 1997 memorandum regarding her interview with Sam Cain Sr. and Sam Cain Jr. During the interview, Sam Cain, Jr. indicated that there "was a house full of people in the house," including "a bunch of kids," on the day of the bike accident. Goldstein recalled that the kids included Lucy, her sister, and T.J. (209a-211a, 284a-286a). Goldstein did not personally interview any of the witnesses, although he tried to set up meetings with Sam Cain, Jr., but he wasn't cooperative (209a-213a, 227a-229a, 257a-258a). According to Goldstein, Ms. Miller was well trained, and he gave her direction as to what he was interested in learning from the witness interviews. Goldstein

acknowledged that the list of suggested topics in Ms. Miller's notes did not include whether there were any eyewitnesses to the bike accident (256a, 260a).

The theories of defense used by Goldstein on behalf of Defendant Grant during the trial included the following: 1) the Defendant did not commit the crimes; 2) the injury to the alleged victim was the result of a bicycle accident; and/or 3) the alleged victim had a habit of making things up (215a-216a, 245a, 276a-277a, 283a-284a).

Goldstein did not call an eyewitness to the bike accident at trial and did not think that an eyewitness would have been of any assistance to him since he believed that the bike accident was not disputed by the alleged victim (219a, 221a). He didn't think there was a problem establishing that something happened based on the statements Lucy Guido made to Sam Cain, Jr, Amanda Cain, and June Merrow that they saw the bleeding and Lucy said it was an accident (230a, 246a). Goldstein did not believe that an eyewitness to the bike accident was important for purposes of linking the alleged victim's injury to the bike accident since he felt that such an eyewitness would have only been important to the Defendant's defense if the bike accident itself was in dispute, and that the only thing an eyewitness to the bike accident could testify to was that the accident occurred. Goldstein, however, did not believe that the bike accident was in dispute or that the same was "relevant." He testified that he did not know that Lucy Guido was going to deny the bike accident until trial (221a, 238a, 242a-243a, 261a).[1] He had witnesses to the bleeding, including Sam Cain, Jr., June Merrow, and Amanda Cain. However, Goldstein thought that the critical issue was relating the bleeding to the charge and he did not believe that lay

witnesses could do this. He conceded that eyewitnesses to the bike accident would have been important if the accident was in dispute (215a-223a, 226a, 235a).

Goldstein did acknowledge that it would have been important for the jury to hear testimony on behalf of the Defendant "that they observed vaginal bleeding from this bike accident." (222a). Goldstein, however, distinguished this statement from earlier questions regarding witnesses by stating that the previous questions were "about eyewitnesses to the accident," and that those previous statements or questions were not "about witnesses to the bleeding." (222a). According to Goldstein, he was not saying that eyewitness testimony of injury from a bike accident was irrelevant, just that he did not think the occurrence of the bike accident was in dispute (240a). Further, Goldstein did not think that a civilian eyewitness, who could say that he or she saw the bike accident cause the bleeding, existed. If such a witness existed, however, Goldstein acknowledged that such a witness would have been relevant, and that if the name of such a witness had come out during the trial, he would have been anxious to produce such a witness (243a-244a). The trial testimony of Sam Cain Sr. and Jr. that T.J. saw the bike accident cause the bleeding (254a, 262a-263a, 265a) did not raise any red flags for Goldstein (254a-256a). He acknowledged that the issue at trial was "what caused the bleeding" – the bike accident or sexual abuse (281a-282a).

Goldstein did not recognize the name T.J.; yet, Goldstein later stated that he was aware of T.J.'s existence sometime early on in the case. He did not have information that T.J. saw the

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[1] During opening statement, the prosecutor argued that the bike accident did not happen and that the Defendant told the alleged victim to say that her injury was the result of a bike accident (19a). In addition, the alleged victim testified during trial that the Defendant told her to say that her injury was the result of a bike accident (66a-67a), but that the injury actually occurred from sexual intercourse (60a-66a, 89a-90a). Finally, Dr. Bond provided testimony during the trial that the alleged victim told her that Defendant told her to say that she was injured from a bike accident (43a-44a).

accident and the injury. He didn't learn that T.J. was an eyewitness until after trial when he received June Merrow's letter (219a, 249a-250a, 263a-264a).[2]

Goldstein never personally interviewed June Merrow. She was not interviewed by the investigators (210a, 280a-281a), and she was not called as a witness during the trial. Goldstein was aware of the existence of June Merrow at the time of the trial (267a). Goldstein did not call June Merrow as a witness because as far as he knew, the only relevant testimony that she possessed was that she saw the bleeding of the alleged victim, that she saw her pants were torn, and that she helped clean her up; as far as he was concerned, there was already testimony to that effect. Further, the medical testimony of the doctors indicated that the injury was not caused by a bicycle accident, but rather was likely due to sexual abuse (241a-242a, 261a, 281a).[3] Goldstein was aware prior to trial that Sam Cain, Jr., Amanda Cain and June Merrow were eyewitnesses to the alleged victim's bleeding. Goldstein never personally interviewed them (224a-227a, 234a).

Goldstein testified that even if the trial transcript revealed that the State's position was that the alleged victim did not suffer any injury from a bicycle accident, it still would not have been important to establish that the injury was in fact the result of a bicycle accident through eyewitness testimony since both doctors, as Goldstein recalled it, indicated that the injury was the result of sexual abuse. Only if the medical doctors had testified that it was equally likely that the injury was the result of a bicycle accident could it have then been important to have produced an eyewitness who could have said that the injury was the result of the bicycle accident (231a-234a).

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[2] Volume II of the trial transcript revealed that the name of T.J. did come out during the actual trial as someone who related that he saw how Lucy was injured (125a-128a).

[3] The trial testimony of Dr. Bradfield indicates that the observations he made of the alleged victim were consistent with the alleged victim's report of an accident from a fall on a bicycle and that he had made a conclusion that sexual abuse was not involved (32a, 36a-37a). Dr. Bond testified her physical exam alone revealed nothing remarkable (45a).

When asked if in fact it was the State's position that the injury to the alleged victim was not the result of a bicycle accident, but was instead the result of sexual abuse, regardless of what the doctors' testimony was, Goldstein could not answer whether it would have then been important to the defense of the Defendant to produce an eyewitness who could have testified that the injury was the result of a bicycle accident (233a). Goldstein denied that he ever became aware of an eyewitness to the bicycle accident before or during the trial. He stated that the first time he became aware of the fact that anyone actually saw the bicycle accident was when he received the letter from June Merrow after the trial (226a, 235a-236a, 247a).

At the time of the prosecutor's opening statement, Goldstein was aware that the prosecutor was taking the position that the alleged victim originally lied about the bike accident causing her injury because that is what the Defendant allegedly told her to say. Goldstein testified that he welcomed this, as it supported his position that Lucy Guido was a liar (246a).

On cross-examination by the prosecutor, Goldstein asserted that he backed off the claim of a bike accident because of the doctors' testimony (268a). He testified that even if he had known about Christopher and Daniel Merrow, he would not have interviewed them because he did not think the bike accident was in dispute (268a-269a).

Goldstein testified that he investigated possible expert witness testimony to challenge what he thought the doctors might testify about. He contacted doctors that his wife worked with at the University of Michigan Medical Center. After it came out that the doctors were testifying that it wasn't a bike accident, he thought to follow up; however, the doctors he talked to would not testify because they had not examined the victim (269a-270a).

On cross-examination, Goldstein confirmed that he did not think it was important to prove the existence of the bike accident because he had statements from Sam Cain, Jr. and Dr.

Bradfield indicating that Lucy had reported she had an accident and that she fell off the bike (274a-275a). When the prosecutor indicated during opening statement that Lucy was going to say she lied about the bike accident, it fit into the defense theory that she was a liar. Goldstein believed he was in a "win-win situation" because he still had Sam Cain, Jr. who said "he saw her dirty and torn and bleeding." (275a-276a). Goldstein also testified that he did not introduce additional evidence about the bike accident because of the doctors' testimony that the injury occurred from sexual abuse, and not from a bike accident (276a). He made a tactical decision that his "main thrust" was that Lucy was a liar, and if she was in fact sexually assaulted, it wasn't by Defendant. He agreed with the prosecutor's suggestion that trying to attack the conclusions of the doctor or to fight about the bike accident, could have detracted from the defense that the victim was a liar (276a-277a).

On redirect, Goldstein confirmed that one of his defense theories was that she was not sexually assaulted and that the injury was the result of a bike accident (283a-284a). Goldstein testified that one of his theories was that Lucy was not truthful, and that if she lied about one event, she was not being truthful about the other alleged events (290a-291a).

Defendant and his mother testified at the hearing that on their first visit with Goldstein, Defendant provided Goldstein with a written list of twelve (12) names of individuals most likely to have information about the case. Those names were the following: Sam Cain, Sr, Sam Cain, Jr., June Cain, June Merrow, Amanda Cain, Lisa Stephens, Dawn Schwartz, Joe Schwartz, Kathleen Grant, Kathleen Wolstone, June Schultz, and William Merrow (292a-295a). Goldstein recalled going over a verbal list of people during his first meeting with Defendant, but he did not recall a written list (296a-297a).

At the remand hearing held on January 17, 2001, Anthony (T.J.) Guido, who was 15 and suffered from a disability, testified that he did not recall a broken bike or his sister riding a broken bike in 1995. He could only recall his sister riding a bike with training wheels. He also did not recall telling his grandfather about a bike accident. He testified that he thought he was coming to court to tell the Court that he loved his two sisters (298a-309a).

T.J.'s father, Anthony Guido, testified that his son suffers from a disability and that he was in a 9th grade class for emotionally mentally impaired students. He testified that there are times when T.J. can remember things and times when he doesn't remember (311a-312a).

Christopher and Daniel Merrow testified again regarding their observations. Christopher Merrow, age 15, testified that he did not have much recollection of the bike accident, other than the bike was green and broken in half, and it occurred at his grandma Cain's house. He recalled that he, his brother Daniel, and T.J. were present at the time of the accident. He drew a picture of the broken bike and recalled that all the children took turns running down the hill with the front part of the bike. He could recall that Lucy rode the bike in this manner, but he did not recall seeing her get hurt. He remembered that Lucy did not bring the bike back up to the top of the hill, and that his mother and Aunt Amanda brought her into the house after she was hurt. He also remembered that there was a pile of metal at the bottom of the hill, and that Lucy was injured in her vaginal area. Christopher confirmed that the day Lucy got hurt was the same day that Lucy was taken to the hospital (315a-329a). Christopher testified that although he could not recall some details, he stood by his prior testimony (330a).

Daniel Merrow, 11 years old, testified that he saw Lucy ride the broken green bike down the big hill. According to Daniel, the bike had three wheels and was held together with two clamps. He saw her hit a pothole, fall forward, and crash; a little piece of metal cut her. After the

accident, Daniel went in the house and said that Lucy had a bike accident. His Aunt Amanda and Aunt Lisa took Lucy to the hospital. According to Daniel, Lucy was hurt in the private area between her legs; he saw that her pants were torn and that she was bleeding. He testified that a piece of her pants was on the handle bars of the bike; Daniel took the torn material and threw it on the ground (331a-343a).

At the conclusion of the hearings, the circuit court found that T.J.'s testimony would have been of no value to the defense, and that the testimony of Christopher and Daniel Merrow would not have been of material benefit to the Defendant in the trial because the boys had different descriptions of the bike. The trial judge found that the "testimony of Daniel and Christopher combined would have created a conflict in my opinion as to even whether or not she was riding a bicycle." The trial judge did not believe that the witnesses "would have directly exculpated the Defendant on the CSC 1 offense." The trial judge ruled that defense counsel was not ineffective (344a-347a).

After remand, the Court of Appeals affirmed the circuit court's ruling. The Court of Appeals summarily stated "Having conducted a de novo review of the record, we agree with the circuit court's conclusion. See People v Johnson, 125 Mich App 76, 81; 336 NW2d 7 (1983) (ineffective assistance cannot be found for failing to interview witnesses unless their testimony would have been of substantial benefit). We conclude that defendant's claim of ineffective assistance of counsel is without merit." People v William Cole Grant, After Remand, unpublished, May 1, 2001, CA No. 214941 (354a).

On or about June 18, 2001, Defendant filed an in pro per delayed application for leave to appeal (14a). In an order dated January 15, 2002, this Court issued an order remanding to the circuit court for the appointment of the State Appellate Defender Office to represent Defendant

in filing a supplemental application for leave to appeal addressing the issues of (1) whether defendant is entitled to a new trial based on newly discovered evidence consisting of eyewitness testimony concerning the bicycle accident or, in the alternative, (2) whether defendant was denied the effective assistance of trial counsel because counsel failed to interview and produce at trial eyewitnesses to the bicycle accident (355a).

The State Appellate Defender Office was appointed on April 1, 2002 (9a). After undersigned counsel filed a supplemental application for leave to appeal, this Court granted leave to appeal in an order dated October 30, 2002 (356a).

I. DEFENDANT IS ENTITLED TO A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE CONSISTING OF EYEWITNESS TESTIMONY CONCERNING A BICYCLE ACCIDENT.

Standard of Review and Issue Preservation

The standard of review is abuse of discretion. People v Lester, 232 Mich App 262, 271 (1998). A circuit court's findings of fact, however, are reviewed for clear error. People v Williams, 228 Mich App 546 (1998). This issue has been preserved by Defendant's motion for new trial.

Discussion

The standard for granting a new trial on the basis of newly discovered evidence was stated in People v Bradshaw, 165 Mich App 562, 567 (1988):

> "For a new trial to be granted on the basis of newly discovered evidence, it must be shown that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) including the new evidence upon retrial would probably cause a different result; (4) the party could not, using reasonable diligence, have discovered and produced the evidence at trial."

See also People v Johnson, 451 Mich 115, 118 fn 6 (1996).

In People v Terry Burton, 74 Mich App 215 (1977), the defendant was convicted of felony murder for the killing of gas station attendant during a robbery which was allegedly planned and executed by a political group named the Republic of New Africa. The defendant denied any involvement. After the trial, two of his sisters testified at the hearing that they were involved in the planning and that the defendant was not involved. The codefendant also testified that the defendant was not involved in the offense.

The Court of Appeals in Burton held that this evidence was newly discovered, and could not have been discovered with reasonable diligence, because the sisters had deliberately withheld it from the defense to avoid risk to themselves, because they assumed the defendant would be acquitted, and because the co-defendant could have invoked the right to remain silent if called to testify at the trial. The Court also held that the new evidence was obviously not cumulative to any of the trial testimony. Finally, the Court found that a new trial was necessary given that the newly discovered evidence could have significant impact on a second jury by creating a reasonable doubt as to the defendant's guilt. Id. at 223.

In the instant case, with regard to the first prong of the above test, the circuit court found that the defense learned during jury deliberations that Christopher and Daniel Merrow were eyewitnesses to a bicycle accident involving Lucy Guido and to the resulting injury sustained by Lucy Guido before she was taken to the hospital (190a).[4] At the conclusion of the motion for new trial, the circuit court stated that "the question of there being a bike accident was presented to the jury in this case." (188a). The circuit court clearly erred in this finding. Although one of Defendant Grant's defense theories involved the theory that Lucy Guido was injured as a result of a bike accident, it was the discovery of eyewitnesses and the fact that they were in possession of testimony that had not previously been discovered by Defendant Grant or defense counsel that is at issue here. There were no eyewitnesses to the bike accident who testified at trial. Defense counsel was not aware of any eyewitnesses to the bike accident until he received a letter from June Merrow after trial (235a, 263a-264a). Evidence is newly discovered if it was unknown to defendant or his counsel at the time of trial. People v LoPresto, 9 Mich App 318 (1961); People v

[4] The relevant testimony has been set forth in the Statement of Facts, supra, and is incorporated herein by reference.

Burton, supra, 222-223. In the instant case, the discovery of two eyewitnesses to the bike accident and its resulting injury was newly discovered.

With regard to the second prong of the test, the circuit court found that the testimony of the Merrow brothers was cumulative (188a-190a). The circuit court clearly erred in this finding. The Court of Appeals disagreed with the circuit court's conclusion that the evidence was cumulative. The Court of Appeals correctly found that the testimony of the Merrow brothers "could have transformed a defense theory without any substantiation to a theory supported by observation of eyewitnesses. This testimony was not corroborative; it would have materially changed the quality, as opposed to the quantity, of the evidence supporting defendant's theory." People v William Cole Grant, unpublished, 5/16/00, CA No. 214941, slip op, p 2 (350a). The testimony of the Merrow brothers is clearly not cumulative. There was no eyewitness testimony at trial regarding the bicycle accident or the resulting injury. Rather, at trial the bike accident was only a theory that was thinly supported by testimony that Lucy Guido initially reported to Dr. Bradfield that the injury was the result of a bicycle accident; however, she testified that she only did so because she was instructed to do so by Defendant (43a-44a, 86a-87a). There was no substantive evidence presented to the jury regarding the existence of the bike accident, as no eyewitness testimony was ever elicited from any of the witnesses who testified at trial. Because no substantive testimony regarding the existence of the bike accident was ever presented to the jury, the eyewitness testimony of Christopher and Daniel Merrow cannot be deemed cumulative.

As for the third prong of the test, the circuit court stated, "I'm not satisfied that even going a little bit further with that evidence (i.e. referencing the bike accident only) that it would of resulted with a different result." (190a). The circuit court clearly erred in this finding. Defendant Grant submits that had the eyewitness testimony of these two witnesses concerning

the bike accident and its resulting injury been presented to the jury, the same would have certainly "provided corroboration of defendant's theory" regarding the bike accident. See People v Mechura, 205 Mich App 481 (1994). This evidence constituted direct support of Defendant Grant's theory of defense and was not presented by other means during trial. Absent any eyewitness testimony regarding a bike accident, Defendant Grant's theory at trial regarding the bike accident remained nothing more than a very abstract and unbelievable story. Without any corroborating, eyewitness evidence, this defense theory appeared to be concocted by an alleged child molester who threatened the young victim and who was desperate to come up with an excuse for the vaginal injury. The testimony of the Merrow brothers would probably have caused a different result at trial, and the circuit court clearly erred in finding otherwise.

Finally, the circuit court found that "defendant using reasonable diligence could have discovered and produced the evidence that he claims he now wishes to produce." (190a). The Court of Appeals agreed that the evidence was "readily discoverable by defendant and could have been produced at trial with reasonable diligence." People v William Cole Grant, unpublished, May 16, 2000, CA No. 214941, slip op, p 2 (350a). Defendant Grant submits that the circuit court clearly erred in this finding. June Merrow testified that she "didn't know that what she knew was important." (174a). Further, she testified that she did not discuss the fact that her two sons revealed to her that they had each personally witnessed the bike accident and related injury to the vaginal area of Lucy Guido with any family members (169a). She testified that she never talked to either of the lawyers (175a). Ms. Merrow did not reveal the information to Defendant himself or his attorney prior to the verdict. Defendant Grant was not present at the time of the bike accident and the related injury, and if none of the witnesses revealed this information to him as they have testified, Defendant would not have any idea that Christopher

and Daniel Merrow were present to personally observe the same. In Burton, the defendant's two sisters deliberately withheld information from the defendant until after the verdict. The Court of Appeals found that the evidence could not have been discovered with reasonable diligence. In the instant case, Ms. Merrow did not deliberately withhold the evidence, but she failed to understand its importance until she attended Defendant's trial.

Furthermore, defense counsel testified at the Ginther hearing that prior to trial he didn't believe the bike accident was in dispute (221a, 240a, 242a, 261a). In light of these circumstances, it is conceivable that reasonable diligence would not have demanded that defense counsel interview every possible witness at the scene. It wasn't until the prosecutor's opening statement that defense counsel allegedly learned that Lucy Guido had changed her claim to include that Defendant Grant threatened her and told her to say the injury was the result of a bike accident (246a). For these reasons, neither Defendant nor his attorney could have discovered this evidence with reasonable diligence.

For the foregoing reasons, the circuit court clearly erred with respect to its critical findings of fact and abused its discretion in denying Defendant's motion for new trial based on newly discovered evidence. Defendant is entitled to a retrial on all three of his convictions, as Lucy's and June's credibility was intertwined at trial. Counts 2 and 3 allegedly occurred while both girls were in the bedroom closet of their apartment in November 1996. Lucy testified that Defendant touched both her and June (73a-81a). During closing argument, the prosecutor argued that June was younger, in special education classes, and that the communication skills of the two girls were different. With regard to Counts 2 and 3, the prosecutor argued that both Lucy and June described the bedroom closet and that both girls witnessed what happened to them and saw what happened to the other. The prosecutor also argued that both girls were not lying (133a,

138a, 140a-141a, 156a-160a). Because June's credibility was buttressed Lucy's credibility with regard to the bedroom closet incident and the swimming pool incident, Lucy's credibility was relevant to all three charges. Defendant Grant is entitled to a new trial on all three convictions.

II. DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE COUNSEL FAILED TO INTERVIEW AND PRODUCE AT TRIAL EYEWITNESSES TO THE BICYCLE ACCIDENT.

Standard of Review and Issue Preservation

Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. The circuit court's findings of fact are reviewed for clear error. Questions of constitutional law are reviewed de novo. People v LeBlanc, 465 Mich 575, 579 (2002). This issue is preserved by Defendant's motion to remand (11a).

Discussion

Defendant Grant submits that he is entitled to a new trial on the alternative ground that defense counsel was ineffective. Ineffective assistance of counsel is an alternative ground if the evidence could have been discovered with reasonable diligence. See People v Johnson, 451 Mich 115 (1996). Assuming arguendo that the circuit court did not abuse its discretion in denying the motion for new trial based on newly discovered evidence, and that the evidence that T.J. Guido and the Merrow brothers possessed could have been discovered with reasonable diligence, Defendant Grant was denied the effective assistance of counsel under both the state and federal Constitutions.

The Sixth Amendment provides that the accused in a criminal prosecution "shall enjoy the right ... to have the Assistance of Counsel for his defence." US Const, Am VI. This requirement is made applicable to the states through the Fourteenth Amendment due process

clause. Gideon v Wainwright, 372 US 335, 342 (1963). Likewise, Const 1963, art 1, §20 provides that the accused in a criminal prosecution "shall have the right ... to have the assistance of counsel for his ... defense."

The United States Supreme Court's standard for review of ineffective assistance of counsel claims is set forth in the companion cases of United States v Cronic, 466 US 648 (1984) and Strickland v Washington, 466 US 668 (1984). This Court has adopted these standards in reviewing the similar Michigan Constitutional protections. People v Pickens, 446 Mich 298 (1994).

In the Cronic case, the Court set forth some of the history of the Sixth Amendment and emphasized that the right was not to "counsel", but rather to "the assistance of counsel for the defendant's defense." The Court cited earlier authority to emphasize the entitlement to both "a reasonably competent attorney" and advice "within the range of competence demanded of attorneys in criminal cases." Cronic, 466 US at 655. Throughout the opinions there is an unmistakable focus upon the ultimate fairness of the trial. In Strickland, the Court noted that the "object of an ineffectiveness claim is not to grade counsel's performance." Strickland, 466 US at 697. The Strickland standard for judging ineffective assistance of counsel has two components: deficient performance and prejudice.

The Strickland Court held that there was no more specific standard of performance than whether counsel's assistance was "deficient, falling below an objective standard of reasonableness." Strickland, 466 US at 687-688. See also People v Pickens, supra, 311. Decisions made in the absence of investigation can be reasonable only to the extent that the decision not to investigate is reasonable:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and

> strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 US at 690-691.

The second component of an ineffective assistance of counsel claim is prejudice. The Court adopted the following standard:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 US 694.

The Strickland Court explicitly rejected an "outcome determinative" test, i.e. "that counsel's deficient conduct more likely than not altered the outcome in the case." 466 US 693. In so doing the Court reasoned that the outcome of a case which includes deficient conduct is less entitled to a presumption of accuracy and fairness.

In Lord v Wood, 184 F3d 1083 (CA 9, 1999), the Court found this standard established where the defense lawyer failed to adequately investigate and introduce information that was sufficient to undermine confidence in the verdict. See also Washington v Smith, 219 F3d 620 (CA 7, 2000). A defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Strickland v Washington, 466 US at 690-691; People v Toma, 462 Mich 281, 302 (2000). If that strategy is not sound, however, counsel's actions may require reversal. People v Dalessandro, 165 Mich App 569, 577-578 (1988); People v Johnson, supra.

One way of overcoming the presumption of sound trial strategy is for the defendant to show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. People v Caballero, 184 Mich App 636, 642 (1990). Defense counsel must engage in a

reasonable amount of pretrial investigation and "at a minimum, . . . interview potential witnesses and . . . make an independent investigation of the facts and circumstances of the case." Nealy v Cabana, 764 F2d 1173, 1177 (CA 5, 1985). Trial counsel owed Defendant "a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 US at 691. "A failure to investigate can certainly constitute ineffective assistance." Washington v Smith, 219 F3d at 630. Failing to present a witness can constitute ineffective assistance of counsel if the failure to do so deprives the defendant of a "substantial defense." People v Bass, 223 Mich App 241 (1997); People v Hoyt, 185 Mich App 531, 537-538 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. People v Bass, supra.

In People v Johnson, supra, this Court found that the defendant's trial attorney was ineffective in failing to call additional defense witnesses to give favorable, cumulative testimony. The defendant in Johnson was convicted of second-degree murder for shooting a man during a fight in a tavern. The owner of the tavern and the defendant's father testified that the defendant did not shoot the victim. A prosecution witness testified that defendant was the shooter. Defendant Johnson presented evidence that his trial attorney was aware of at least four other witnesses who would have testified that defendant did not shoot a gun during the incident. At the Ginther hearing, the defense attorney's testimony did not suggest a strategic reason for his failure to call the cumulative witnesses. Acknowledging that a trial is "not simply a balance scale," this Court found the exculpatory evidence to be so substantial that it could have changed the outcome of the trial." People v Johnson, supra, 122.

In the instant case, Defendant Grant was denied his constitutional right to the effective assistance of counsel at trial when trial counsel failed to interview eyewitnesses to the bike

accident (Christopher and Daniel Merrow, and T.J. Guido) before trial, and where defense counsel failed to produce them to testify at trial.[5] The eyewitness evidence would have cast reasonable doubt on the prosecution's claim that the vaginal injury to Lucy Guido was the result of sexual penetration by Defendant, and would have cast doubt on Lucy Guido's credibility with regard to the other charges.

The Circuit Court's Findings Are Clearly Erroneous

At the conclusion of the Ginther hearing, the circuit court found that the evidence from the eyewitnesses would not have been of substantial benefit to the defense (344a-347a). The circuit court made the following findings:

> "THE COURT: Mr. Goldstein is an attorney who has been practicing law for a good number of years. His office is in Washtenaw County. He from time to time practices in this Court and I've come to know him from his practice in this Court. He is a very busy practitioner. He is extremely intelligent. He is one of the few lawyers that I know that can come into Court and try a case without having to take notes and be able to remember what people have had to say. I make my remarks with respect to Mr. Goldstein, because by [sic] respect that he is a busy practitioner and from time to time I, like many other judges, have had trouble getting him into Court because he's so busy. And I like Mr. Goldstein, but on the other hand, I found him in contempt once and fined him $100 because of not being here when he was supposed to be if I remember it right or not doing something correctly. So, I put forth those things on the record. He is a good lawyer. The question is whether or not his failure to interview witnesses amounts to ineffectiveness because he would then be ignorant of evidence that would have been of substantial benefit to the Defendant and I think that's important as to whether or not that evidence would have been of substantial benefit for the Defendant. We've taken the testimony of the three boys again today. Two—testimony of two have been taken previously. T.J.'s testimony, in my opinion, would have been of no value, now or then. He has indicated that he is not aware of his sister Lucy being aware – he is not aware of her being in a bike accident. Christopher testified and gave us a substantial picture of this bicycle being not a bicycle at all. If

[5] Defendant herein incorporates by reference the facts set forth in the Statement of Facts, supra.

> anything, a unicycle without a seat on it. It was a front wheel of a bicycle, connected to the fork and the handle bars, that people were apparently running down the hill with. In his previous testimony, he testified that he was at the bottom of the hill. This testimony he testified that he was at the top of the hill and as a final analysis, he testified that he does not recall seeing the accident. I am satisfied that that would not have been of material benefit to the Defendant in the trial of this case. Daniel would have been six years old at the time of this incident. 11 today he said, right? And his testimony is at direct odds with Christopher's testimony. He testified that they were riding a full bicycle, that is a bicycle that had a seat on it and there were pedals and it was a small bike, described how their knees would have been up to their chin at my urging. I was trying to get what kind of a picture he had and didn't describe this as what we would classify as a unicycle without a seat on it and that wouldn't even have been a fair characterization, because a unicycle has pedals to it and this front wheel connected to the fork and the handle bars would not be classified as a unicycle, but that's the best and the closest analogy. I'm satisfied that Daniel would have been of no benefit. The testimony of Daniel and Christopher combined would have created a conflict in my opinion as to even whether or not she was riding a bicycle and I recognize that this is all superimposed on the suggestion that there was a bicycle accident that occurred during the course of the trial. The testimony of Daniel and Christopher combined would have created a conflict in my opinion as to even whether or not she was riding a bicycle and I recognize that this is all superimposed on the suggestion that there was a bicycle accident that occurred during the course of the trial. I do not believe that the witnesses, Mr. Goldstein is alleged to have failed to interview, would have been of assistance to the Defendant and would have directly exculpated the Defendant on the CSC 1 offense and accordingly, I am satisfied that the claim that counsel has been ineffective must fall and I will deny the motion to have him declared ineffective in this case." (344a-347a).

Without stating its reasons, the Court of Appeals summarily agreed with the circuit court (354a).

Defendant Grant submits that this is not a sound reading of the events that unfolded at trial and at the evidentiary hearings, and that there is clear error in the circuit court's findings of fact. Further, the circuit court's conclusions of law are erroneous. First, Defendant Grant is not

contending that Mr. Goldstein was not an experienced attorney; however, the issue is whether Mr. Goldstein's representation in the instant case was deficient.

Second, as for T.J.'s testimony at the Ginther hearing held in 2001, it was clear that he was unable to remember the events that occurred in 1995 due to his emotional impairment (311a-312a). However, as defense counsel elicited at the Ginther hearing, T.J. told Sam Cain Sr. and Sam Cain Jr. that he saw how Lucy got hurt (254a-256a). See also (125a-128a). His hearsay statements to the Cains would have been helpful. See MRE 803(1) and (2). At a minimum, defense counsel's failure to act when he learned this information during trial is indicative of his deficient performance.

Third, an examination of the record should persuade this Court that the circuit court's preoccupation with whether the cycle was a bicycle or a unicycle was irrelevant. Although the Merrow boys had slightly inconsistent recollections of the cycle, the discrepancies were minor and turned on the kind of highly specific details that eyewitnesses often remember differently. Further, the issue here was whether Lucy Guido's vaginal injury was the result of sexual abuse or whether it was the result of a bike accident. Their testimony from 1998 and 2001 was consistent on the important points: Lucy was riding the cycle down a hill, she fell off the bike, she was hurt in her "private part," she was bleeding, and she was taken to the hospital (176a-180a, 183a-186a, 315a-343a). Furthermore, Sam Cain Sr. described it as a bicycle where the front had been broken off and the kids used it as a unicycle (122a), and Amanda Cain also confirmed that there was a bicycle that was broken in half that Lucy played with (132a).

Fourth, the circuit court's focus on the few discrepancies between Christopher Merrow's testimony in 1998 at the motion for new trial hearing and his testimony in 2001 at the Ginther hearing was misplaced. Although there may have been some haziness in his memory,

Christopher Merrow's testimony in July 1998 was taken the closest in time to the incident and, not surprisingly, contains the fewest discrepancies. Further, he testified in 2001 that although he could not recall some details, he stood by his prior testimony (330a). The most important elements of the Merrow boys' statements remained consistent: Lucy was riding a bike down a hill, she had an accident, she hurt her vaginal area, and she was taken to the hospital (315a-343a).

Fifth, it is inconceivable how the circuit court found that "The testimony of Daniel and Christopher combined would have created a conflict in my opinion as to even whether or not she was riding a bicycle". In 1998, both Merrow boys described it as a bicycle (178a, 183a). In 2001, Christopher Merrow said it was a green bike that was broken in half (317a). Daniel Merrow said it was a broken green bike, and that one of the handle bars had a piece of metal that stuck out of it. He also testified that it was held together with clamps (332a-333a). Regardless of the bike's condition, the testimony of the Merrow boys was consistent that Lucy Guido's vaginal injury was due to an accident while riding this cycle. This testimony clearly would have benefited the defense theory that the vaginal injury was due to a bike accident and not sexual abuse.

Finally, in its opinion on remand, the circuit court found that the witnesses would not have been of assistance to the Defendant and "would [not] have directly exculpated the Defendant on the CSC 1 offense" (346a-347a). A quick review of the evidence produced at trial reveals that one of the defense theories was that Lucy Guido's vaginal injury was due to a bike accident. However, Lucy Guido testified that she only initially reported it as a bike accident because Defendant Grant told her to and because he threatened her (86a-87a). Dr. Bradfield testified that both types of injuries were very similar (23a, 32a, 40a). Lucy Guido testified at trial that Defendant took her to the woods and engaged in sexual penetration (61a-65a). No

eyewitnesses were produced at trial. The testimony of the Merrow boys at the post-conviction hearings indicated that they, along with T.J., were eyewitnesses to the bike accident and to the subsequent bleeding. This testimony would have substantially benefited the defense.

Defense Counsel's Performance was Deficient

An examination of the record should persuade this Court that the performance of Defendant's trial counsel clearly fell below an objective standard of reasonableness. It is undisputed that none of the witnesses who testified at trial were actually eyewitnesses to the bike accident that the defense maintained caused Lucy Guido's vaginal injury. Attorney Goldstein acknowledged at the remand hearing that this was one of the theories which he asserted at trial (215a-216a, 245a).

Failure to interview and produce T.J. Guido

In terms of the witnesses who did testify during trial, the identity of at least one eyewitness, T.J. Guido, who was physically present and who actually observed how Lucy was injured, was revealed by at least two witnesses during the trial testimony. Both Sam Cain, Sr. and Sam Cain, Jr. testified at trial that T.J. told them how Lucy was injured (125a-127a). Notwithstanding this testimony, Goldstein never interviewed T.J. and did not call T.J. as a witness during the trial.[6] Goldstein said that this information did not raise any red flags (255a-256a). Goldstein was adamant at the Ginther hearing that he did not learn about T.J. being an eyewitness to the bike accident until he received June Merrow's letter after the verdict (263a-

264a). Presumably, Goldstein simply missed this crucial testimony and the opportunity to produce an eyewitness at trial. However, his closing argument at trial seems to indicate that he heard it (147a), but failed to act.

Goldstein acknowledged that if in fact there was an eyewitness who could testify that the bike accident resulted in the bleeding, such testimony would have been relevant, and that if the name of such a witness had come out during the trial, he would have been anxious to produce such a witness (244a).

Based on these facts, Goldstein's failure to interview and call T.J. as a witness clearly fell below an objective standard of reasonableness, and certainly prejudiced Defendant Grant to such an extent as to deprive him of a fair trial as this crucial, corroborating testimony to Defendant's theory was never presented to the jury. People v Carrick, 220 Mich App 17 (1996); People v Johnson, supra. Likewise, the failure to interview and call T.J. as a witness is such a blatant error on Goldstein's part that it overcomes the presumption of a legitimate trial strategy. Goldstein was physically present during trial and should have learned from the Cains' testimony that T.J. was an eyewitness to the bike accident. At a minimum, he should have taken steps to interview and produce T.J. Guido.

Failure to interview and produce Christopher and Daniel Merrow

In addition, testimony at the remand hearing indicated that Defendant provided Goldstein with a list of 12 witnesses who potentially possessed information related to his defense; this list included June Merrow (292a-295a). However, June Merrow was never interviewed by Goldstein

[6] Defendant recognizes that at the time of the remand hearing in January 2001, T.J. was unable, due to his emotional/mental disability, to recall the bike accident that allegedly occurred five years earlier in October 1995. However, had Goldstein taken steps at the time of Defendant's

or his investigators (210a, 280a-281a). Had she been interviewed, defense counsel would have learned that her sons, Christopher and Daniel, were eyewitnesses to the bike accident that allegedly caused the victim's vaginal injury. When asked why he did not call June Merrow as a witness, Goldstein said that as far as he knew, the only relevant testimony that she possessed was that she saw the bleeding of the alleged victim, there was already testimony to that effect, and that he believed the medical testimony of the doctors indicated that the injury was not caused by a bicycle accident (261a, 281a). However, Goldstein also claimed that he did not believe the bike accident was in dispute (219a, 221a). Had he interviewed June Merrow, he would have discovered that her sons were eyewitnesses to the bike accident. Goldstein's pretrial investigation was less than complete. Further, Dr. Bradfield said that the two types of injuries (bike accident v. sexual abuse) were very similar and a diagnosis depended on the history of the injury as related by the victim (23a, 32a, 40a). In fact, Goldstein eventually acknowledged that no doctor ever ruled out the possibility that the injury could in fact have been the result of a bike accident (288a-289a).

The remand hearing also revealed that Goldstein was informed prior to the trial that Sam Cain, Jr. informed his paralegal that there "was a house full of people in the house," including a bunch of kids on the day of the incident (209a-213a). Had Goldstein followed up on these interviews, or had the appropriate questions regarding who else was at the house on that day been asked, the names of the eyewitnesses to the bike accident and resulting injury would have been known by Goldstein. As the circuit court ruled in denying the motion for new trial, this evidence "could have been brought forward by the defendant with very little effort" and that "the

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trial to secure his testimony, he may have been able to recall at that time. Further, Defendant submits that T.J.'s hearsay statements would have been admissible under MRE 803(1) and (2).

defendant using reasonable diligence could have discovered and produced the evidence" (189a-190a).

One way to overcome the presumption of sound trial strategy is for the Defendant to show that his counsel's failure to prepare for trial resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited Defendant. People v Bass, supra. The above referenced facts clearly establish and support such a finding. Goldstein's failure to engage in the above referenced actions clearly shows a total lack of preparation and attention prior to and during the trial that not only fell well below any objective standard of reasonableness, often resulting in his total "ignorance of" a vast array of valuable evidence, but also resulted in his "failure to present [this] valuable evidence that [undoubtedly] would have substantially benefited" Defendant, and "may [very] well have made a difference in the outcome of the trial." People v Bass, supra.

In this case, there was no indication that there was an enormous amount of witnesses to investigate. It was unreasonable to not make strenuous efforts to contact each witness. Although defense counsel claimed that the Cains made it very difficult to be interviewed, there was no claim that June Merrow was difficult (257a-258a). It was possible that each witness would have exculpatory evidence or may have led to other information or people that could provide exculpatory evidence. Failure to investigate, prepare, or present a substantial defense has been grounds for ineffective assistance. See, e.g., People v Nickson, 120 Mich App 681 (1982); People v Winans, 187 Mich App 294 (1991); People v Nyberg, 140 Mich App 160 (1984). The record shows that defense counsel was aware of June Merrow. The record also indicates that Sam Cain Sr. and Jr. possessed information that T.J. told them how Lucy was injured. However, for some unexplained reason, the efforts of Goldstein and his staff did not result in securing this

information prior to trial. Although Goldstein gave direction to his paralegal before the witness interviews, the notes of topics to be discussed with the witnesses did not include whether there were any eyewitnesses to the bike accident (256a, 260a). Even assuming that Heidi Miller, a paralegal, did not possess the expertise to ask the right questions of June Merrow and Sam Cain Sr. and Jr., this does not excuse defense counsel's failure to follow up. Upon obtaining Ms. Miller's notes/report, defense counsel should have personally interviewed these witnesses and asked the right questions. Presumably, the right questions in this case were not that complicated. However, Goldstein testified that even if he had known of the Merrow boys before trial, he would not have interviewed them because, prior to trial, he did not think the bike accident was in dispute (268a-269a). However, it is inconceivable how Goldstein failed to grasp or anticipate that the bike accident would be in dispute, as he presumably reviewed Dr. Bond's report and her letter to Officer Duquette prior to trial.

Further, it is even more inexplicable how defense counsel heard Sam Cain Sr. and Jr. testify during trial that T.J. Guido told them how Lucy Guido was injured, and yet the importance of this information seemingly failed to register with defense counsel, as he took no steps during trial to interview and/or produce T.J. Guido. Given the tedious nature with which appellate counsel had to lead Goldstein at the Ginther hearing to the realization that the eyewitness testimony of the Merrow brothers might have been important to the defense (222a, 240a-265a, 281a-282a), it is clear that Goldstein failed to appreciate the importance of these eyewitnesses. An attorney with ordinary skill and training would have taken steps to interview and produce T.J. after hearing the prosecutor's opening statement that the bike accident was in dispute, and after hearing testimony from Sam Cain Sr. and Jr. that T.J. told them how Lucy got

hurt. Defense counsel's failure to interview and call these eyewitnesses was not the result of a complete or reasonable pretrial investigation or of a sound trial strategy.

Further, defense counsel's failure to interview and call T.J. Guido and the Merrow brothers was highly questionable in light of the weaknesses in the prosecution's case against Defendant Grant. There was no physical evidence linking Defendant to the alleged sexual misconduct; there were no eyewitnesses to the alleged sexual misconduct; and Lucy and June Guido had credibility issues. The mutually reinforcing statements of Christopher and Daniel Merrow (and of T.J. Guido) were probably the strongest evidence that defense counsel could have offered. They were related to the complainants and had no reason to lie for Defendant Grant. The testimony of these eyewitnesses would have provided strong corroboration for Defendant's defense, and would not have opened the door to any damaging evidence.

Furthermore, this is not a case where defense counsel made the decision not to present the three witnesses after interviewing them in person. There are no claims here that defense counsel made a sound professional judgment that these witnesses should not be called due to his assessment of their articulateness and demeanor. Counsel could not make this claim, as he never interviewed these witnesses, never looked them in the eye, and never heard them tell their story. Rather, defense counsel attempted to justify his failure to interview and produce these eyewitnesses by maintaining that the bike accident was not in dispute, that he had three witnesses (Sam Cain, Amanda Cain, and June Merrow) who saw Lucy Guido bleeding and heard her say that she was bleeding because of an accident, and because the expert testimony from the doctors indicated that the injury was due to sexual abuse (230a-234a, 246a, 276a).

Although Goldstein testified that he was unaware before trial that Lucy Guido would change her story and claim that Defendant made her say it was a bike accident, he did

concede that he heard the prosecutor's opening statement wherein she maintained that the proofs would show that Defendant told Lucy to claim her injury was due to a bike accident. However, Goldstein testified that he welcomed this because it supported his position that Lucy was a liar (246a), and he agreed with the prosecutor's suggestion on cross-examination that it was a "win-win situation" (275a-276a). Goldstein further claimed that he made a tactical decision that his "main thrust" was that Lucy was a liar, and if she was in fact sexually assaulted, it wasn't by Defendant Grant. He agreed with the prosecutor at the Ginther hearing that trying to attack the conclusions of the doctors or to fight about the bike accident could have detracted from the defense that the victim was a liar (276a-277a). This claimed excuse of strategy by Goldstein is disingenuous, as the trial record indicates that he did not abandon the bike accident defense (147a, 151a), and that his belief during trial was that the physical evidence was "50/50" (152a-153a). Furthermore, even assuming this was Goldstein's new-found strategy, it was not a sound trial strategy. Any reasonably competent defense attorney would not have abandoned the defense theory of a bike accident when there were eyewitnesses to the bike accident and the resulting injury and bleeding. The eyewitnesses to the bike accident constituted direct support of Defendant Grant's theory of defense. Absent any eyewitness testimony regarding a bike accident, Defendant Grant's theory at trial regarding the bike accident remained nothing more than a very abstract and unbelievable story. Without any corroborating, eyewitness evidence, this defense theory appeared to be concocted by an alleged child molester who threatened the young victim and who was desperate to come up with an excuse for the vaginal injury. The testimony of the Merrow brothers and T.J. Guido would have substantially benefited the defense.

As for Goldstein's reliance on the three witnesses who saw the bleeding and heard Lucy Guido say it was an accident, (Sam Cain, Jr., Amanda Cain, and June Merrow), Goldstein seemed to repeatedly miss the point at the Ginther hearing that this was insufficient to establish that the bike accident occurred and that the vaginal injury was a result thereof. It wasn't until mid-hearing that he started to grasp that the Merrow brothers were important because they saw the bike accident and the subsequent bleeding (222a, 240a-265a, 281a-282a). However, he still insisted that this would only be important if the doctors were willing to say that the injury could have been caused by a bike accident (231a-234a). Further, Goldstein was mistaken – Dr. Bradfield testified at trial that the injury could have been caused by sexual abuse or by a bike accident, and that it depended on the victim's account, as both types of injuries were very similar (23a, 32a, 40a). Therefore, this excuse for not interviewing and calling the eyewitnesses had no merit.

For all of the above reasons, it is clear that defense counsel was not acting within the range of competence demanded of attorneys in criminal cases, and that his performance was deficient.

Prejudice

In addition to showing that trial counsel made unreasonable and serious errors in the investigation, preparation, and presentation of a defense, Defendant must also show that he was prejudiced by defense counsel's incompetent performance. Defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different." Strickland, 466 US at 694; Williams v Taylor, 529 US 362 (2000).

The case against Defendant was far from unassailable. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by error than one with overwhelming record support." Strickland, 466 US at 696. Essentially, the only evidence of Defendant's guilt came from the complainants, Lucy and June Guido. The medical testimony was dependent on the history as presented by the complainants. The evidence of guilt was not overwhelming. In essence, "this trial was a credibility contest." Washington v Hofbauer, 228 F3d 689, 707 (CA 6, 2000). Presentation of the eyewitnesses to the bicycle accident would have shown the jury that the complainant's story of sexual abuse was unbelievable. Defense counsel asserted Defendant Grant's innocence in his closing statement, but he did not present any eyewitnesses to the bicycle accident. As the prosecutor pointed out in her closing argument, the Cains were not eyewitnesses to the injury (138a-139a). Like virtually all trials on charges of sexual assault, this trial turned on the credibility of the complainants, and the prosecutor steadfastly maintained that the complainant was not lying (133a, 138a-141a, 156a, 160a). Here, Defendant Grant did not testify, and his attorney did not present any eyewitnesses to the defense contention that the injury was caused by a bike accident. Defense counsel was required to interview and call eyewitnesses who could inform the jury of the actual bike accident and the resulting injury and bleeding.

Trial counsel's failure to adequately investigate, prepare, and present eyewitnesses had a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v Williamson, 507 US 619, 637 (1993); Gilliam v Mitchell, 179 F3d 990, 995 (CA 6, 1999). All Defendant needed to do was establish reasonable doubt. There is a reasonable probability that testimony of the eyewitnesses to the bike accident and the resulting injury would have created reasonable doubt. Washington v Smith, 219 F3d at 634. The Due Process Clause of the

Fourteenth Amendment protects an accused in a criminal case against conviction except upon proof beyond a reasonable doubt. Jackson v Virginia, 443 US 307, 319 (1979). The jury must be instructed that it may only convict if the prosecution establishes that the defendant is guilty beyond a reasonable doubt and that its decision must be based on a careful examination of the evidence. Victor v Nebraska, 511 US 1 (1994). A criminal defendant is entitled to be found not guilty if the jury has a reasonable doubt as to guilt. It is not necessary to provide evidence that, if believed, would make it impossible for the defendant to have committed a crime to create a reasonable doubt.

This Court should hold that Defendant Grant was denied his constitutional right to the effective assistance of counsel, and reverse his convictions and remand the case to the circuit court for a new trial. Defendant is entitled to a retrial on all three of his convictions, as Lucy's and June's credibility was intertwined at trial. Counts 2 and 3 allegedly occurred while both girls were in the bedroom closet of their apartment in November 1996. Lucy testified that Defendant touched her and June (73a-81a). During closing argument, the prosecutor argued that June was younger, in special education classes, and that the communication skills of the two girls were different. With regard to Counts 2 and 3, the prosecutor argued that both Lucy and June described the bedroom closet and that both girls witnessed what happened to them and saw what happened to the other. The prosecutor also argued that both girls were not lying (133a, 138a, 140a-141a, 156a-160a). Because June's credibility was buttressed Lucy's credibility with regard to the bedroom closet incident and the swimming pool incident, Lucy's credibility was relevant to all three charges. Defendant Grant is entitled to a new trial on all three convictions.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks this Honorable Court to reverse his convictions and grant a new trial.

Respectfully submitted,

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Dated: January 16, 2003